Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPLICATION NO 08-18-95
LAMIN PCA, EDGAR JOSEPH JR AND WAN ADNAN FCJJ
26 JUNE, 10 JULY 1995

***Civil Procedure** — Appeal — Leave to appeal — Value of subject matter less than RM250,000 — Refusal of Court of Appeal to grant leave — Whether decision of Court of Appeal final — Whether Federal Court has jurisdiction to entertain application for leave to appeal against Court of Appeal's refusal — Courts of Judicature Act 1964 ss 68(1)(a) & 96(a)*

In a motor accident case, the High Court gave its judgment in favour of the plaintiffs. The defendant was dissatisfied. As the value of the subject matter was less that RM250,000, the defendant applied to the Court of Appeal for leave to appeal before filing its appeal, pursuant to s 68(1)(a) of the Courts of Judicature Act 1964 ('the Act'). However, its application was refused. The defendant then relied on s 96(a) of the Act, and applied for leave to appeal against the refusal in the Federal Court. The question of law which arose was whether the power to give leave to appeal was confined exclusively to the Court of Appeal. In deciding the question, the court had to consider whether the refusal of leave by the Court of Appeal was a judgment or order within s 96(a) of the Act, so as to enable the Federal Court to entertain the application.

Held, dismissing the appeal:

(1) (Per **Lamin PCA**) This case was in the nature of an application to the Federal Court for leave to appeal to the Court of Appeal. If an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s 68(1)(a), leave must first be obtained from the same court. Likewise, s 96(a) dictates that before a notice of appeal can be filed in the Federal Court, its leave must first be obtained. The Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal

(2) (Per **Edgar Joseph Jr FCJ**) As both the court and the right of appeal thereto are creatures of statute, no appeal lies unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal. In this case, there is no such provision. The exercise of a discretion to grant or refuse leave to appeal is not judgment or order within the meaning of s 96(a) of the Act.

[Bahasa Malaysia summary

Dalam suatu kes kemalangan jalanraya, Mahkamah Tinggi telah memberikan keputusan yang memihak kepada plaintif. Defendan tidak berpuas hati. Oleh kerana nilai perkara yang terlibat adalah kurang daripada RM250,000, defendan telah memohon kepada Mahkamah Rayuan untuk kebenaran membuat rayuan sebelum memfailkan rayuannya, menurut s 68(1)(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Walau bagaimanapun, permohonannya telah ditolak. Defendan kemudiannya bergantung kepada s 96(a) Akta tersebut, dan memohon untuk kebenaran membuat rayuan terhadap penolakan tersebut di Mahkamah Persekutuan. Soalan undang-undang yang timbul ialah sama ada kuasa untuk memberikan kebenaran untuk merayu adalah terhad secara eksklusif kepada Mahkamah Rayuan. Dalam memutuskan soalan tersebut, mahkamah terpaksa mempertimbangkan sama ada penolakan permohonan untuk kebenaran oleh Mahkamah Rayuan merupakan suatu penghakiman atau perintah di dalam maksud s 96(a) Akta tersebut.

Diputuskan, menolak rayuan itu:

(1) (Oleh **Lamin PMR**) Kes ini sesungguhnya adalah suatu permohonan ke Mahkamah Persekutuan untuk kebenaran membuat rayuan ke Mahkamah Rayuan. Jika suatu rayuan harus difailkan di Mahkamah Rayuan dalam keadaan di mana ia termasuk dalam terma s 68(1)(a), kebenaran mesti didapatkan terlebih dahulu daripada mahkamah yang sama. Begitu juga, s 96(a) menyatakan bahawa sebelum suatu notis rayuan boleh difailkan di Mahkamah Persekutuan, kebenaran daripada mahkamah itu harus didapatkan terlebih dahulu. Mahkamah Persekutuan tidak mempunyai kuasa untuk memberikan kebenaran bagi tujuan memfailkan suatu rayuan di Mahkamah Rayuan.

(2) (Oleh **Edgar Joseph Jr HMP**) Oleh kerana kedua-dua mahkamah dan hak untuk merayu ke mahkamah merupakan hasil ciptaan statut, tidak ada rayuan yang akan dibenarkan melainkan jika suatu pihak yang terkilan itu dapat membawa dirinya di dalam terma suatu peruntukan statutori. Dalam kes ini, tidak terdapat peruntukan sedemikian. Penggunaan budi bicara untuk memberi atau menolak kebenaran untuk membuat rayuan bukanlah suatu penghakiman atau perintah mengikut maksud s 96(a) Akta itu.]

Notes

For cases on applications for leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 477–508.

Cases referred to

Bland v Chief Supplementary Benefits Officer [1983] 1 All ER 537; [1983] 1 WLR 262 (folld)
Geogas SA v Trammo Gas Ltd, The Baleares [1991] 3 All ER 554; [1991] 1 WLR 776 (folld)
Housing of the Working Classes Act 1890, Re, ex p Stevenson [1892] 1 QB 609 (folld)
Lane v Esdaile [1891] AC 210 (folld)
Poh, Re [1983] 1 All ER 287 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 67, 68(1)(a), 79, 96(a)
Appellate Jurisdiction Act 1876 s 3 [Eng]
Arbitration Act 1979 s 1(7) [Eng and Wales]
Housing of the Working Classes Act 1890 Pt I [Eng]
Rules of the Supreme Court 1883 O 58 r 15 [Eng]
Rules of the Supreme Court 1965 O 53 [Eng]
Social Security Act 1980 s 14 [Eng]
Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 r 8(1) [Eng]

RK Nathan (*RK Nathan & Co*) for the appellant.
Guy Varegheese (*Shahriza Varegheese & Chandran*) for the respondent.

10 July 1995

Lamin PCA: This was an application for leave to appeal to this court filed by the applicant/appellant, the defendant in a motor accident case in the Ipoh High Court. The applicant/appellant in fact prayed for an order from this court for leave *to appeal to the Court of Appeal* pursuant to s 68(1)(a) of the Courts of Judicature Act 1964 (as amended). We heard the application on 12 June 1995, and on the same day we unanimously dismissed it with costs. I have had the benefit of reading the draft grounds of judgment of my learned brother Edgar Joseph Jr FCJ, and I agree entirely with his reasoning and conclusion.

However, I wish to add briefly why I agreed in dismissing the application.

The applicant/appellant had earlier filed a similar notice of motion in the Court of Appeal pursuant to s 68(1)(a) of the Courts of Judicature Act 1964, applying for leave to appeal and it was heard and dismissed by the said court on 31 October 1994. After that, the applicant/appellant came before this court to make the second attempt.

In view of the circumstances of this case, it was no doubt necessary for leave to be obtained from the Court of Appeal before an appeal on the case could be lodged. That is the requirement under s 68(1)(a). But for an appeal from the Court of Appeal to lie before the Federal Court in respect

of any civil matter decided by the High Court, leave must first be obtained from the Federal Court (s 96(a)). In other words, no further appeal in respect of a High Court case can be lodged in the Federal Court without obtaining leave from the said court itself. But the case before us was in the nature *of an application* to the Federal Court, and *not an appeal* from the Court of Appeal. The applicant/appellant in the said application was asking the Federal Court for leave to appeal to the Court of Appeal. There is nothing in the Courts of Judicature Act 1964 making provision for such an application. To put it simply, if an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s 68(1)(a), leave must first be obtained from the same court. Likewise, s 96(a) dictates that before a notice of appeal can be filed in the Federal Court, its leave must first be obtained. The Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal.

The operation of s 79 of the Act has also been touched in the course of the proceedings. It states:

> Whenever application may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of Appeal.

On the above reasoning, clearly s 79 has no application here. Exclusive jurisdiction is given to the Court of Appeal.

26 June 1995

Edgar Joseph Jr FCJ: This was a defendant's application for leave to appeal to this court, following the refusal of the Court of Appeal to grant leave to appeal under s 68(1)(a), Courts of Judicature Act 1964 ('the Act') from the decision of the High Court, Ipoh, given in favour of the plaintiffs in a running down case where the decretal sum amounted to less than RM250,000.

At the outset, counsel for the respondents raised the preliminary objection that no appeal lay to this court from such a refusal of the Court of Appeal.

By s 67 of the Act, jurisdiction is conferred upon the Court of Appeal 'to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter'.

However, by s 68(1)(a) of the Act, a fetter is imposed on the right to bring such appeals where the value of the subject matter is less than RM250,000, for it provides that:

> No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal.

A So far as the Federal Court, which is the ultimate court of appeal, is concerned, in respect of appeals to it from the Court of Appeal in civil matters, its appellate jurisdiction flows from s 96 of the Act which provides:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the
B Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with section 97
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and
>
C (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

The question of law, which arose upon the preliminary objection was whether, having regard to the language of the relevant statutory provisions, the legislature had intended to confine the power to give leave to appeal
D exclusively to the Court of Appeal.

It is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

E It follows that the answer to the question of law posed above, having regard to the circumstances of the present case, depended upon whether the refusal of leave by the Court of Appeal was a judgment or order within the meaning of s 96(a) of the Act. At the conclusion of the arguments, my view was that it was not.

F I was fortified in my conclusion by a number of English authorities to which I shall now refer.

In *Re Housing of the Working Classes Act 1890, ex p Stevenson* [1892] 1 QB 609, the Housing of the Working Classes Act 1890 provided that a party dissatisfied with the quantum of compensation awarded to him
G under Pt I of the Act:

> ... may, upon obtaining the leave of the High Court, which leave may be granted by such Court, or any judge thereof at chambers, in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of
H compensation to a jury.

A perusal of the judgments in *ex p Stevenson* shows that a judge in chambers had refused leave to appeal, and the Divisional Court had held that no appeal lay to it from his decision. The matter was then taken on further appeal to the Court of Appeal which comprised Lord Esher MR,
I Fry and Lopes LJJ.

The following extracts from the judgments of their Lordships are particularly helpful and so I reproduce them.

Lord Esher MR said this [1892] 1 QB 609 at pp 610–611:

> ... It is clear that, in effect, the provision is that the party dissatisfied may apply for the leave of the High Court to appeal from the decision of the arbitrator to a jury. The High Court may grant such leave, either sitting as a Divisional Court, or through a judge thereof sitting at chambers, on being satisfied that justice requires it. If anything further were needed to shew that the proceeding is an appeal, it is to be found in the subsequent provisions of the schedule as to costs which distinctly speak of it as such. I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final. In either case there is no appeal to this court. What was said in the case of *Lane v Esdaile* [1891] AC 210 supports the view that I am taking. But the very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant be correct, it would follow that the case might be taken from one court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed.

And this is what Fry LJ said at p 612:

> ... The legislature has thought fit to impose a condition in respect of this right of appeal, viz, that the leave of the High Court must be obtained, which leave is to be granted in the manner pointed out, viz, either by the Divisional Court or by a judge at chambers. Then is the order — for such I will assume it to be — of the High Court, granting or refusing leave to appeal, subject to appeal? In my opinion it is not. I do not come to that conclusion on the ground that the word 'order' is not properly applicable to it; but from the nature of the thing and the object of the legislature in imposing this fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal. Suppose, for the sake of argument, that in this case the claimant's grounds for wishing to appeal are frivolous; if the contention on his behalf is correct, he could appeal from the judge at chambers to the Divisional Court, from the Divisional Court to this court, and from this court to the House of Lords on the question whether he shall be allowed to appeal. It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore, from the very nature of the thing the decision of the court which has the power of giving leave to appeal is, in my opinion, final. This seems to me to be the ratio decidendi of *Lane v Esdaile* [1891]

A AC 210. That case appears to decide that, where the right to appeal depends upon the granting or refusal of leave to appeal by a court, that granting or refusal of leave must be final.

And this is what Lopes LJ said at p 613:

B If an appeal were allowed from the granting or refusal of leave to appeal, the result would be that, instead of checking appeals, they might be multiplied to a most mischievous extent; for an appeal from the granting or refusal of leave might be carried from the Divisional Court to this court, and from this court to the House of Lords. For these reasons I think that the preliminary objection must prevail.

C It is interesting to note that in *Bland v Chief Supplementary Benefits Officer* [1983] 1 All ER 537; [1983] 1 WLR 262, it was held that a decision of a social security commissioner under r 8(1) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980, to grant or refuse leave to appeal to the commissioner from a decision of a tribunal was not a 'decision' from which s 14 of the Social Security Act 1980 contemplated D there should be an appeal with leave, since it was not a decision which was determinative of the matters in dispute. In so holding, the Court of Appeal applied *Re Housing of the Working Classes Act 1880, ex p Stevenson.* The presiding judge Sir John Donaldson MR said, inter alia, this [1983] 1 All ER 537 at pp 539–540; [1983] 1 WLR 262 at pp 265–266:

E So I return to the question whether there is a right of appeal to this court. This court is the creature of statute, and it is necessary to point to some statutory right of appeal before it can have jurisdiction.

...

Reconstructing that subsection to make it slightly more intelligible, it reads: 'No appeal under this section shall lie from a decision except — F (a) with the leave of the Commissioner ... or (b), if he refuses leave, with the leave of the appropriate court.

What is said by counsel for the respondent is that 'decision' in s 14 means an order determinative of the matter in dispute ... But, in his submission, the grant or refusal of leave to appeal is not such a decision at all. It is by contrast merely the grant or refusal of a permission which G determines nothing at all except whether the applicant is or is not permitted to appeal.

Now that argument might at first sight seem somewhat refined, but it is well founded in authority ...

In *Lane v Esdaile* [1891] AC 210, the ratio was somewhat narrower than H the ratio in *ex p Stevenson.* In *Lane*, the court was concerned with the question whether an appeal lay to the House of Lords from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court, in a situation when time limited by Rules of the Supreme Court 1883, O 58 r 15, for appealing had expired. So far as relevant, the I order was in the following terms:

No appeal to the Court of Appeal from any interlocutory order, ... shall, except by special leave of the Court of Appeal, be brought after the expiration

> of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year ...

The court held that no appeal lay.

In the course of his judgment, Lord Halsbury LC said this [1891] AC 210 at p 212:

> Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any court of review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate court could enter and must enter into that question, then the court which is the ultimate court of appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and in as much as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal.

And, this is what Lord Herschell said at p 214:

> I think that the matter [referring to an application for leave to appeal] was intrusted, and intended to be intrusted, to their discretion; and that the exercise of a discretion of that sort intrusted to them is not, within the true meaning of the Appellate Jurisdiction Act 1876, an order or judgment from which there can be an appeal.

And this is what Lord Field said at p 216:

> ... The legislature intended that the matter should not go beyond the Court of Appeal, and therefore they have used the words that leave is to be given — that is the leave of the Court of Appeal. It seems to me that if your Lordships were to say now 'We will give leave' and the Court of Appeal must enforce that, it would be imposing upon them the duty of giving a leave, as their leave, which they in their own judgment, think ought not to be given.

And, lastly, this is what Lord Macnaghten said at pp 215–216:

> My Lords, I concur. I think that according to the true construction of the Judicature Act 1876 and Orders, the Court of Appeal are constituted the sole and final judges of the question whether an appeal to them should or should not be admitted when the proposed appellant has allowed the prescribed period to elapse, and therefore that there can be no appeal from the grant or refusal of that indulgence.

The two principles to be distilled from the judgments of their Lordships in *Lane* may be stated thus:

(1) the exercise of a discretion to grant or refuse leave to appeal is not an order within the meaning of s 3 of the Appellate Jurisdiction Act 1876; and

(2) there is no distinction between an order refusing and an order granting leave to appeal.

Lane v Esdaile [1891] AC 210 was followed in *ex p Stevenson* [1892] 1 QB 609.

In *Geogas SA v Trammo Gas Ltd, The Baleares* [1991] 3 All ER 554; [1991] 1 WLR 776, it was held (see the headnote) that the House of Lords has no jurisdiction to entertain an appeal from a decision of the Court of Appeal granting or refusing leave under s 1(7) of the Arbitration Act 1979 to appeal from a decision of the High Court in respect of an arbitration award, since s 1(7) provides that the leave of the High Court or the Court of Appeal is necessary for an appeal to the Court of Appeal from such a decision of the High Court and, whenever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from its very nature, final and conclusive and without appeal, unless there is an express right of appeal from it, because if there were to be a further appeal, the power to grant or refuse leave would have no effect. The decision of the Court of Appeal on the grant or refusal of leave under s 1(7) is therefore final and unappealable.

In *Re Poh* [1983] 1 All ER 287, the House of Lords held, applying the rule in *Lane v Esdaile*, that it had no jurisdiction to entertain a petition to it for leave to appeal against the refusal of the Court of Appeal to grant leave to apply for judicial review under the Rules of the Supreme Court 1965 O 53.

Lord Diplock, speaking for the House said this [1983] 1 All ER 287 at pp 287–288:

> The history of this application for leave to appeal to their Lordships' House is that the applicant originally sought leave under RSC O 53 r 3 to apply for judicial review of a decision of the Immigration Appeal Tribunal. The application was heard ex parte by Glidewell J sitting as a Divisional Court and leave was refused. The applicant appealed ex parte by originating motion to the Court of Appeal, who also refused leave. From that refusal the application now seeks leave to appeal to their Lordships' House.
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> Their Lordships are not concerned with the procedure whereby this application moved from the Divisional Court to the Court of Appeal, because the question we have to consider is whether this House has jurisdiction to entertain the application. Counsel instructed by the Treasury Solicitor has taken the preliminary point that the House has no jurisdiction under the Appellate Jurisdiction Act 1876 to entertain an appeal from refusal of leave to apply for judicial review under RSC O 53. He relies on the construction of s 3 of the 1876 Act, which was approved by this House in *Lane v Esdaile* [1891] AC 210 and followed by the Court of Appeal in

Re Housing of the Working Classes Act 1890, ex p Stevenson [1892] 1 QB 609, where the underlying common sense of the rule in *Lane v Esdaile* is stated clearly by Lord Esher MR, Fry and Lopes LJJ. The rule in *Lane v Esdaile* was again applied by the Appeal Committee of this House in *Whitehouse v Board of Control* [1960] 3 All ER 182, [1960] 1 WLR 1093.

At this point, I would refer to a submission by counsel for the applicant. He had urged that we could entertain this application under our inherent powers. This submission overlooks the fundamental point that an appeal is a creature of statute and so is this court. It follows, that in the words of Donaldson MR in *Bland's* case cited above, at p 539, 'it is necessary to point to some statutory right of appeal before it can have jurisdiction'. There is, of course, no such provision. This submission, therefore, also failed.

Accordingly, applying the underlying principles enunciated in the authorities cited above, we held, at the conclusion of the arguments on the preliminary objection taken by counsel for the respondents, that we had no jurisdiction to entertain this application for leave, which we therefore dismissed with costs.

Lamin PCA, the presiding judge, and Wan Adnan FCJ, the other member of the court, have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim